

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

In the Matter of )  
 )  
Advanced Television Systems )  
and Their Impact upon the )  
Existing Television Broadcast )  
Service )

MM Docket No. 87-268

To: The Commission

PETITION FOR RECONSIDERATION  
OF THE SIXTH REPORT AND ORDER

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### SUMMARY

RGV Educational Broadcasting, Inc. ("RGV") is the licensee of KMBH-TV, Harlingen, Texas, on Ch. 60. The FCC paired Ch. 60 with Ch. 38\* as its DTV channel. Ch. 38\* is reserved for noncommercial educational ("NCE") use only. RGV respectfully requests that the Commission reconsider this decision and assign RGV Ch. 38, without NCE reservation, as the DTV pair to existing NTSC commercial Ch. 60.

RGV is a noncommercial broadcaster which has chosen to provide NCE service, including CPB programming on Ch. 60, a commercial channel. Reclassification would significantly lower the value of the station and hinder RGV's ability to raise capital necessary to continue operations in Harlingen. RGV provides the community, a low per capita income area of Texas, with CPB programs, news and local community interest programs that otherwise might not be available.

In prior cases the FCC has held that it is not in the public interest to reclassify commercial stations that offer NCE programming. The DTV proceeding did not solicit comment or propose to reclassify stations from commercial to research NCE status. The reservation of Ch. 38\* would not serve the public interest because 33% of the channels allocated to Harlingen already are NCE reserved - more than the benchmark 25%. Reserving 66% of the channels for NCE use is unprecedented.

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OF THE SIXTH REPORT AND ORDER**

<sup>1</sup>Sixth Report and Order, MM Docket No. 87-268, FCC 97-115 (released April 21, 1997).

**I. RGV Educational Broadcasting, Inc.**

RGV is a noncommercial educational broadcaster serving the Rio Grande Valley area of Texas. RGV is licensed to operate on Ch. 60, Harlingen, Texas. Currently, three NTSC channels are designated in Harlingen, Chs 4, 44\* and 60. Ch. 44\* currently is reserved for NCE use. While RGV operates with a noncommercial educational format, Ch. 60 is not reserved for noncommercial educational use. Channel 38\* is a new channel assignment created by the Sixth Report and Order, not an existing reserved channel, and did not need to be reserved for educational use.

Obviously, noncommercial reserved channels have a lower market value than commercial channels. As such, RGV is in a better position to obtain financing to continue to operate the station based on being licensed on a commercial channel. Conversely, the severe diminution in value that would result from the reservation of Ch. 38\* would adversely affect RGV's ability to obtain financing.<sup>2</sup> Thus, the Commission's action might have the unintended effect of reducing educational service in the Rio Grande Valley, rather than preserving it. The Rio Grande Valley area has a relatively low per capita income and RGV provides

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<sup>2</sup>A broadcast license cannot be pledged as collateral. However, the value of the license is inherent in the good will value of the licensee and the stock of the licensee lawfully may be pledged to secure financing. See e.g. In re Application of Bill Welch, 3 FCC Rcd 6502 (1988) (The Communications Act of 1934, as amended does not preclude private parties from acquiring defeasible private rights in communications licenses); Isenburg, *Toward A Compromise on Collateralizing Loans to Broadcasters*, 45 Fed. Comm L. J. 541 (1993).

needed NCE television service, including original program productions.

## II. The DTV Table Of Allotments

In the Sixth Further Notice in the DTV proceeding (released August 14, 1996), the FCC proposed an initial DTV Table of Allotments.<sup>3</sup> In the Sixth Further Notice, the Commission proposed to assign RGV the adjacent Ch. 61 as its DTV channel. Sixth Further Notice at Appendix B p. 37. The FCC did not discuss or propose to reserve Ch. 61 for NCE use.

In the Sixth Report and Order, the Commission adopted the final DTV Table of Allotments which differs considerably from the proposed Table. In the final Table, the Commission assigns KMBH-TV Ch. 38\*, rather than Ch. 61.<sup>4</sup> Sixth Report and Order at Appendix B p. 40. Channel 38\*, unlike the Commission's first proposal to assign Ch. 61, is designated for noncommercial educational use only. Sixth Report and Order, Appendix E, p. E-24 (47 U.S.C. §73.622(b)).

RGV may be unable to keep its commercial channel (60) and surrender its DTV channel (38\*). Normally, a broadcaster is

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<sup>3</sup>Sixth Further Notice of Proposed Rule Making, MM Docket No. 87-268, 11 FCC Rcd 10968 (1996).

<sup>4</sup>RGV submitted comments in the Sixth Notice of Proposed Rulemaking questioning the FCC's proposal in the initial DTV Table of Allotments to assign RGV Ch. 61. RGV pointed out that RGV would be subject to two possible relocations, first to DTV Ch. 61, then after the FCC recovers and auctions Chs 60-61, RGV would have to again relocate to a core Chs 7-51. The Commission addressed RGV's concern by assignment of Ch. 38\*, a core Channel, instead of Ch. 61, but unexpectedly reserved Ch. 38\* for noncommercial use.

given the choice of which of the two transition channels to surrender at the end of the transition period. The FCC has set a target date of 2006 for the cessation of analog service. At the end of the transition period, NTSC service will be shut down and broadcasters will be required to surrender one of their two transition channels to the FCC.<sup>5</sup>

However, prior to the end of the transition period, the Commission plans to recover Chs 60-69. Sixth Report and Order at ¶¶1, 80.<sup>6</sup> The FCC plans to auction Chs 60-69 for use by other services. Sixth Report and Order at ¶80. Therefore, due to the FCC's early recovery plan for Chs 60-61, RGV may be relocated from Ch. 60 to another yet unspecified channel under compensation arrangements that have yet to be determined. Therefore, RGV cannot rely upon being able to continue to use its commercial Ch.60 after the transition.

Due to the early recovery program, RGV may be subject to two costly transitions: commencement of DTV broadcasting and relocation from Ch. 60 to second transition channel. The FCC has not adopted final rules for the recovery of Chs 60-61, particularly rules for compensation of broadcasters forced to relocate. The Commission plans to initiate a separate rulemaking

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<sup>5</sup>Fifth Report and Order, MM Docket No. 87-268, FCC 97-116, ¶99 (released April 21, 1997).

<sup>6</sup>The FCC has attempted to provide all eligible broadcasters with a DTV allotment within the core Channels 2-51. Sixth Report and Order at ¶79. The FCC believes that the public interest is best served by allocating DTV channels in the core spectrum which allows for early recovery and auction of spectrum from Channels 60-69. Sixth Report and Order at ¶77.

proceeding to address how to recover Chs 60-69 and how the new service providers will compensate the incumbent broadcasters on channels who are forced to relocate. Sixth Report and Order at ¶80.

Given the economic pressures that may be faced by RGV in the transition to DTV and the possible relocation from Ch. 60 due to the Chs 60-69 auction program, this is a particularly inopportune time for the FCC to lower the value of RGV's facilities by reclassifying its license from commercial to noncommercial reserved. This unexpected reclassification can only impede RGV's ability to secure needed financing in order to continue service to the Rio Grande Valley. As a result, the reclassification is not in the public interest.

The Commission may have believed it was helping RGV because of the longer DTV construction period allowed for NCE broadcasters. However, in a small market such as Harlingen, the additional time allowed, i.e., one year, May 1, 2003, rather than May 1, 2002, is far less critical to RGV than the severe diminution in the value of its license and the resulting difficulty in obtaining financing. Sixth Report and Order, ¶76.

**III. The FCC Did Not Follow Proper Procedures When It Reclassified RGV's Station.**

**A. The FCC Penalized RGV For Offering NCE Programming**

By reclassifying RGV's station, the Commission has penalized RGV for voluntarily choosing to operate with a noncommercial education format. The FCC previously has held it contrary to the public interest to reclassify a commercial



licensee, "for having previously chosen to operate as a noncommercial station." Amendment of §73.202(b) Table of Allotments, FM B'cast Stations, Richmond, VA, 1 FCC Rcd 1048, 1049 (1986).

In that case, the FCC denied a citizens' group's petition to reserve a channel for NCE use to prohibit a noncommercial broadcast licensee operating on a commercial channel from assigning its station to a commercial licensee. The Commission reasoned that such a reclassification, "would discourage other similarly situated licensees desiring to provide noncommercial educational programming." Id. Licensees who might otherwise want to offer NCE programming would not do so in fear that the FCC would reclassify the station to reserved status. Accordingly, the FCC refused to reclassify stations being used to provide NCE service.

The Richmond, Virginia case makes clear that the FCC previously has determined that the action taken here is not in the public interest. The DTV allocation decision in this case is contrary to the Commission's precedent and policy determination that reclassifying broadcasters who voluntarily chose to offer NCE programming does not promote and may actually deter the provision of NCE programming.

**B. The FCC Failed To Comply With The Channel Classification Rules.**

Classifications of television stations are contained in the TV Table of Allotments set forth in Section 73.606(b) of the Commission's Rules. Reclassification of a station from

commercial to noncommercial can only be accomplished by initiating a rulemaking to amend the TV Table of Allotments. See 47 U.S.C. §1.420. Section 1.420 requires a party or the FCC to initiate a petition for rulemaking to add a new station to the table, reclassify a station, modify a license of a UHF TV station to a VHF channel, or modify a license to specify a new community. Only after the Commission makes a public interest determination in the course of a rulemaking can a channel be reclassified from commercial to noncommercial.

For example, in 1978 the Commission approved an exchange of channels between a reserved noncommercial educational UHF station in San Mateo, California and a commercial UHF station in San Francisco.<sup>7</sup> To achieve this, the Commission was required to issue a Notice of Proposed Rulemaking for the purpose of amending the table of allotments and was required to elicit comments from interested parties. Only after making factual findings to support a conclusion that the public interest would be served by a channel exchange, did the Commission amend the allotment table and modify the licenses of the respective stations. See also Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations, 59 RR2d 1455, 1456 (1986).

Here, the Commission did not initiate a rulemaking to reclassify RGV's license from commercial to NCE reserved or to

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<sup>7</sup>San Francisco and San Mateo, California, 68 FCC2d 860 (1978), recon. denied, 45 RR2d 233 (1979).

change the ratio of reserved/unreserved channels in Harlingen, Texas. Nor did the Commission make a public interest determination or elicit comments from interested parties to determine the impact a change in the station reclassification would have on the community.

The DTV proceeding cannot serve as a reclassification proceeding under these rules for several reasons. The DTV proceeding failed to give notice of any intent to reclassify stations from commercial to NCE. RGV had no opportunity to comment, and the Commission made no evidentiary findings to support the reclassification. Each of these matters is discussed in turn below.

**C. The DTV Proceeding Was Not Intended To Reclassify Stations From Commercial To Noncommercial Status.**

The Public Notices in the DTV proceeding fail to give notice of any proposal to reclassify commercial stations to reserved NCE status. The announced purpose of the DTV proceeding was to: (1) adopt the DTV Table of Allotments, (2) adopt the rules for initial DTV allotments, (3) adopt the procedures for assigning DTV frequencies, and (4) adopt the plans for spectrum recovery. Sixth Report and Order at ¶1. None of these proposals gave RGV any notice that the FCC would reclassify RGV's station license from commercial to noncommercial during the DTV proceedings.

The notices of proposed rulemakings in the DTV proceeding never discussed reclassification of TV stations from commercial to noncommercial status. The only discussion

regarding NCE stations concerns procedures for existing, vacant noncommercial channels. The FCC said it would try to pair existing vacant NCE channels with a second NCE DTV channel so that these vacant allotments could be used for new NCE stations that would have two NCE channels during the transition period. The FCC said that in markets where channels were congested, it might have to use an existing vacant NCE channel as the new DTV channel for an existing NCE station. This would mean that the vacant NCE channel would no longer be available for a new NCE service, but at least the existing NCE station would be able to transition to DTV. The FCC said it would not use vacant NCE channel allotments as commercial DTV transition channels.

Nowhere in this discussion is there any proposal to assign a reserved channel to a broadcaster choosing to broadcast NCE programming on a commercial channel:

[W]e conclude that we will use vacant noncommercial allotments for ATV use only where there is no feasible alternative for assigning an ATV channel to an existing broadcaster. Similarly, we will leave vacant noncommercial allotments without an ATV channel pair only when there is no other practicable way to award an existing broadcaster an ATV channel. We will in no event use a vacant VHF channel allotment reserved for noncommercial purposes for commercial ATV. Moreover, only as a last resort will we delete a reserved channel, or use for commercial purposes an ATV channel that would otherwise be paired with a vacant noncommercial allotment, where that channel or allotment would be necessary to provide first noncommercial full-service Grade B coverage in a community.... [I]f it is impossible to pair an ATV channel with a vacant noncommercial allotment, we will protect the vacant allotment with both NTSC and ATV separation requirements, provided that ATV spacing is, as anticipated, less than or equal to NTSC spacings.

Second Report and Order and Further Notice of Proposed Rule Making, MM Docket No. 87-268, 7 FCC Rcd 3340, 3350 (1992). See also Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5376, 5383, MM Docket No. 87-268 (1992). In the Sixth Report and Order, the Commission decided to replace existing vacant noncommercial NTSC allotments with new noncommercial reserved DTV allotments. Sixth Report and Order at ¶112.

The proposal and its resolution with respect to vacant, NCE channel allotments are inapposite to RGV. Channel 38\* is not an existing, vacant noncommercial channel. Channel 38\* is a new DTV channel allotment that the Commission chose to designate as a reserved channel, apparently because RGV operates its existing Ch. 60 in an NCE format. The Commission's discussion of vacant NCE channel allotments did not give RGV any notice that the Commission might reclassify RGV's license in the course of the DTV proceeding.

Reclassification of a station license from commercial to noncommercial without prior notice or opportunity to comment is simply unprecedented and, where such notice has been given, the FCC ultimately decided not to make the reclassification because it would have a chilling effect on broadcasters who choose to offer NCE service. In the Matter of Richmond, VA, supra, 1 FCC Rcd at 1049 (1986).

**D. The FCC Failed To Afford RGV Proper Notice Required Under The FCC's Rules And The Administrative Procedures Act.**

Because the FCC did not initiate a separate rulemaking proceeding to reclassify RGV's station, or give notice in the DTV proceeding, the FCC excluded any opportunity for public comment on this issue. "There must be compelling reasons to justify agency action without notice or public participation, especially where the interests of the audience ...could be adversely affected...." In the Matter of Richmond, VA 1 FCC Rcd at 1049. Broadcast allotment proceedings are rulemakings of general applicability. Amendment of Section 73.202(b), Table of Allotments, FM B'cast Station, Prineville and Sister, Oregon, 8 FCC Rcd 4471, 4472 (Pol. & Rule Div., 1993). "It would be impossible to determine in advance all of the stations or persons potentially affected by a broadcast allotment proceeding ..."  
Id. By failing to give prior notice to the reclassification of RGV's license, the FCC failed to afford RGV, and any other interested party, such as a lender with a security interest in the facility, the opportunity to comment on this action.

The Administrative Procedures Act requires agencies to conduct rulemakings and give parties an opportunity to participate in the rulemaking proceeding. See, 15 U.S.C. §553. It is only through a rulemaking procedure or an adjudication that the Commission may modify a license. See Upjohn Co. v. FDA, 811 F.2d 1583 (D.C. Cir. 1987).

[T]he requirements of the Administrative Procedures Act are fundamental to due process and that all

administrative decisions shall include such findings and conclusions as are reasonably necessary to intelligently inform the parties involved of the purport thereof, as well as the reasons therefor.

Bell Lines, Inc. v. U.S., 263 F. Supp. 40, 46 (1967). The Commission did not initiate a rulemaking intended to change the status of RGV's authorization from commercial to NCE use only. In failing to do so, the Commission has denied RGV its fundamental rights to participate in the proceedings.

**IV. The Commission's Action Was Not Supported By Any Evidence In The Record Of Need To Create Another NCE Station In Harlingen, Texas.**

In addition to failing to afford prior notice, the Commission did not provide any reason or explanation for reclassifying RGV from commercial to reserved status. Even if the DTV notices could somehow be construed to give notice to RGV, the FCC must do more than merely give notice of its actions, it must take and consider evidence. Like any agency, the FCC is required to support its decisions by substantial evidence in the record. 15 U.S.C. §706(2)(E).

The Sixth Report and Order contains no discussion of any evidence to support the reservation of Ch. 38\* for noncommercial use. The Order contains no discussion or reasoned analysis of a policy rationale for this action. Also, given the Commission's decision in the Richmond Virginia case that such action is not in the public interest, the Commission also would have to explain its basis for reversal of its earlier policy determination on this same point. E.g., Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970),

cert. denied, 403 U.S. 923 (1971) (FCC must provide a reasoned explanation for reversing a prior public interest determination).

No evidence is discussed in the Sixth Report and Order to show that Harlingen needs a second reserved noncommercial channel. The existing NTSC reserved channel, Ch. 44\*, is paired with a new, reserved DTV channel, Ch. 34\*. Thus, the ratio of one reserved and two commercial channels in Harlingen has been preserved by finding a DTV pair for the existing Ch. 44\* reserved channel.

Designation of Ch. 38\* as a reserved channel goes beyond preservation of the status quo. Reservation of Ch. 38\* for noncommercial use means that the ratio of commercial to noncommercial channels in Harlingen is changed from 2 to 1 - 1 to 2. Only one commercial channel will remain (4 or 31). Therefore, after the transition, two out of three channels designated to Harlingen will be reserved for NCE use only. This is simply unprecedented.

The FCC historically has reserved no more than 25% of available channels for NCE use. Amendment of Section 73.606(b), TV Table of Allotment, B'cast Station, Anchorage, Palmer and Seward, Alaska, 5 FCC Rcd 7570, 7571 (Pol. & Rule Div. 1990) (quoting Sixth Report and Order on Television Allotments, 41 FCC 148, 168 (1952)). In that instance, the Commission reserved a second NCE station in Anchorage only after determining that Anchorage needed a second channel. Anchorage had six commercial



channels and only one noncommercial channel (only 16.6% of the channels were reserved for NCE use.)

Harlingen already exceeded the 25% guideline because it had 33% of its existing channels reserved for NCE use, i.e., 1 out of 3 channels. In contrast, reserving a second NCE channel in Harlingen, i.e., Ch. 38\*, would reserve 66% of the channels in Harlingen for NCE use. There is no evidence in the record to support a finding that Harlingen needs to have a 2 to 1 NCE channel ratio. The FCC is required to make a public interest determination prior to reclassifying stations. See Allotment Order 59 RR2d at 1456.

The fact that RGV is offering a noncommercial educational format on one of the commercial channels supports exactly the opposite conclusion. This area historically has been economically depressed. As a result, RGV was able to purchase a failing station and offer an NCE service. But because of the relatively low per capita income of the area, financing station operations is relatively difficult. Availability of capital is enhanced by preserving the collateral value of the station, not diminishing it by re-classifying its license.

Moreover, the Commission is charged with making an equitable distribution of channel allocations in the public interest. The Commission should preserve the existing 2 to 1 ratio of channel allocations, consistent with its general policy on NCE reservations, regardless of the current format of the stations.

The Commission should not take an action in a general proceeding that has a serious impact upon RGV and the community of Harlingen without following all applicable notice and comment procedures and obtaining evidence regarding the potential impact of its decision on the community. While such evidence may reveal public support for the Commission's reservation of additional NCE channels, it may also reveal others who would prefer more commercial broadcast services. Here, the Commission simply does not know, because it gave no notice and took no evidence.

Actions in a rulemaking proceeding not supported by substantial evidence in the record or a reasoned discussion and explanation, especially in light of prior decisions, should be corrected on reconsideration. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). An agency must articulate a "rational connection between the facts found and the choice made." See City of Brookings Mun. Tel. Co v. FCC, 822 F.2d 1153, 1165 (D.C. Cir. 1987).

Under the circumstances, the Commission should reconsider and amend newly adopted Section 73.622(b) to remove the reserved status classification for DTV Channel 38\*, Harlingen, Texas.

**CONCLUSION**

WHEREFORE, good cause having been shown, RGV respectfully requests that the FCC reconsider its decision to designate new DTV Ch. 38\*, Harlingen, Texas as a reserved noncommercial channel, and to assign Ch. 38 to RGV as a commercial channel DTV pair to existing commercial NTSC Ch. 60, notwithstanding RGV's decision to provide NCE service on its channel.

Respectfully submitted,

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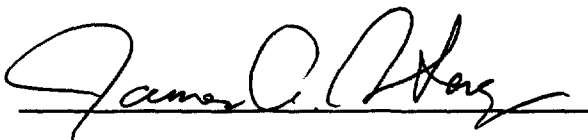
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Dated: May 21, 1997

**CERTIFICATE OF SERVICE**

I, Magdalene Copp, a secretary of the law office of  
Ross & Hardies, do hereby certify that I have this 21st day of  
May 1997, served by hand-delivery a copy of the foregoing  
"Petition for Reconsideration of the Sixth Report and Order" to:

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